

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1204

To be argued by
LAWRENCE M. HERRMANN

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1204

Bq/s

UNITED STATES OF AMERICA,

Appellee,

—v.—

NEIL A. SCARFO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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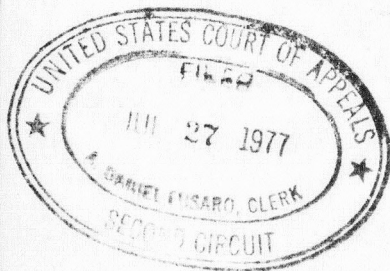


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**United States Court of Appeals
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Docket No. 77-1204

UNITED STATES OF AMERICA,

Appellee,

—v.—

NEIL A. SCARFO,

Appellant.

BRIEF FOR THE APPELLEE

Statement of the Case

This is an appeal from a judgment of conviction in the United States District Court for the District of Connecticut, entered by the Court (Jon O. Newman, J.) on April 4, 1977, after a jury verdict of guilty on March 2, 1977.

On December 9, 1976, a Grand Jury in New Haven, Connecticut, returned a one count indictment (Criminal No. N-76-153) charging Appellant Neil A. Scarfo, a teller, with embezzling the sum of \$15,000.45 from the Home Bank and Trust Company, Meriden, Connecticut, a Federally insured bank, in violation of 18 U.S.C. § 656.

On December 16, 1976, Scarfo entered a plea of not guilty to the indictment.

On February 14, 1977, a jury was empanelled and sworn before the Honorable Jon O. Newman, United States District Judge. On February 22, 1977 the Government commenced presenting evidence to the jury. On March 2, 1977, the jury trial concluded, and after approximately six hours of deliberation, the jury returned a verdict of guilty.

On April 7, 1977 the appellant was sentenced to imprisonment for a period of two years, suspended after four months and was placed on probation for a period of three years. Execution of sentence was stayed until April 18, 1977.

On April 18, 1977 bond pending this appeal was set in the amount of \$5,000 non surety. A timely notice of appeal was filed.

Statutes and Rules Involved

Title 18, United States Code

Section 656, Theft, embezzlement, or misapplication by bank officer or employee:

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than \$5,000 or imprisoned not more than five years, or both; but if the amount embezzled, ab-

strated, purloined or misapplied does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

Title 18, United States Code

Federal Rules of Evidence, Rule 403, Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Title 18, United States Code

Federal Rules of Evidence, Rule 701 Opinion testimony by lay witnesses:

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Title 18, United States Code

Federal Rules of Evidence, Rule 702 Testimony by experts:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Title 18, United States Code

Federal Rules of Evidence, Rule 803

Hearsay exception; availability of declarant immaterial:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * * * *

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Questions Presented

1. Were Government exhibits 4-B and 4-C properly admitted into evidence?
2. Did the trial court properly admit into evidence testimony of Louis Buonanni concerning certain gambling slips forming part of Government exhibit 15?

3. Did the Government present evidence from which a reasonable mind might fairly conclude guilt beyond a reasonable doubt?

Statement of Facts

In June, 1975 Defendant Neil A. Scarfo was hired as a driver by the Home Bank and Trust Company, Meriden, Connecticut, a Federally-insured bank. (Tr. 602; G.A. 21A)*. He was subsequently promoted to the position of teller and in May, 1976 he became the vault teller. (Tr. 278). As vault teller, Scarfo would keep the other tellers supplied with cash or buy their excess cash from them, and would maintain the cash vault, either buying cash from another bank when needed or shipping the excess to another bank via Wells Fargo. (Tr. 272, 414).

Tuesday, September 7, 1976, was the first working day after Labor Day weekend. Scarfo went to lunch around 11:20 a.m., had an automobile accident and was taken to the hospital. (Tr. 659-661). He was x-rayed, was not put on medication and was taken home that afternoon. (Tr. 662-666).

Scarfo's absence was noted by another employee around noon and the hospital was called. (Tr. 132, 149). His accident was reported to bank officers, and two Vice-Presidents, Donald McKnight and Virginia Spear, were directed to count Scarfo's cash to balance him out. (G.A. 11A; Tr. 59, 78).

It was necessary to obtain a duplicate key to unlock the two cash drawers and the coin compartment at Scarfo's teller station. (G.A. 33A; Tr. 213). McKnight and Spear conferred with Kenneth Cowing, a Vice-Pres-

* References marked "Tr." refer to the transcript. References marked "G.A." refer to the Government's Appendix.

ident in charge of security, and determined that the back-up key to Scarfo's teller station was kept in a special safe deposit box which required dual access. (G.A. 24A, 25A, 34A). It took about twenty minutes to find the two dual access keys, as the two officers who normally retained the keys, Lorraine Douglas and John Stewart, had left the bank early that morning due to illness. (G.A. 28A, 34A-35A; Tr. 284, 625).

The dual access safe deposit was opened, the duplicate key obtained, and Scarfo's station was unlocked. (G.A. 35A, 36A). Cash was found in each of the two currency (bill) drawers, as was the combination to the coin compartment below and the combination to Scarfo's cash vault inside the main vault. (G.A. 36A). McKnight and Spear alternately counted the cash in each other's presence, together with the coin in the coin compartment and some coin which was not locked up, did the computation necessary to balance Scarfo using his own figures for his inner vault cash, and determined that there was a shortage of \$15,000.45. (G.A. 36A-37A; Tr. 214-215). After some difficulty occasioned by a time delay on the inner vault, Scarfo's cash vault was opened. (G.A. 14A). His vault cash was counted and agreed with his own record on the vault cash sheet (Government Exhibit 4A) (G.A. 37A; Tr. 214).

The bank President, Raymond Kellogg, was notified of the shortage and personally did a recount of all the currency bill by bill. (G.A. 14A-15A). The coin was also counted and the area searched. (G.A. 38A). Mr. Kellogg then checked for an error or mis-entry by reviewing Scarfo's teller balance sheet (Government Exhibit 2), which had been completed by McKnight and Spear in making their computations (G.A. 49A-57A), Scarfo's teller tape (Government Exhibit 9), and comparing his teller transfer slips with those of the other tellers (Government Exhibits 7A-7F) (G.A. 15A). Further time was spent by Kellogg and other officers analyzing the

transactions on Scarfo's teller tape for September 7, 1976. (G.A. 15A). The tape for the business day of September 7 commenced after the close of the official business day for September 3, 1976, around mid-afternoon on Friday, and covered the transactions occurring during the late afternoon of September 3, as well as the morning of Tuesday, September 7, 1976. (Tr. 50-51). Scarfo had "batched out" twice during that period, once just before leaving for lunch on September 7, so that all his checks and deposit items had been tabulated and sent to the Proof Department for computer processing. (G.A. 50-51A; Tr. 382-386). Contact was maintained with the Proof Department and items were visibly checked to locate any possible error in transportation or omission. (G.A. 16A, 19A). The tape agreed with the actual items, and the conclusion of the proof supervisor was that if \$15,000 was paid by mistake, it was a gift. At trial, Scarfo acknowledged the improbability of such a mistake, as permission is required to cash such a large item. (G.A. 161A-162A).

Attention was focused on a withdrawal, from the vault, after the close of business on September 3, 1976 of \$8,000 in large bills (\$100 and \$50 bills) at a time when Scarfo already had a sizable amount of large bills (\$14,150) in his drawer. (G.A. 15A, 45A, 117A). After Scarfo's accident, the count of large bills in his top and reserve cash drawers at his teller station was \$3,600 and \$11,000 respectively. The initial study of the tape indicated no large transactions which would account for a drop from \$22,150 to \$14,600 in large bills. (G.A. 15A).

On the afternoon of September 7, 1976, Scarfo was contacted at home by Senior Vice-President Raymond Lyons, and could offer no assistance in locating the shortage. (Tr. 79-80). He was telephoned that evening by Kellogg, and explained that on Friday afternoon, September 3, 1976, some tellers had purchased small bills from

him with large bills (which would have increased his supply of large bills). (Tr. 49-50). Scarfo was asked to come to the bank the next day. (Tr. 52).

On September 8, 1976 James Azzola, the auditor, did an audit of the entire branch and by his own count confirmed the shortage of \$15,000.45 in Scarfo's cash. (G.A. 62A-63A).

Scarfo was interviewed on September 8, 1976 by Kellogg and Lyons and then by McKnight. Scarfo again explained that other tellers gave him large bills for small bills, without using teller transfer slips, and that he had taken the \$8,000 out of the vault on the afternoon of September 3, 1976 because of a cash shortage in the bank. (Tr. 49-50; G.A. 46A-47A). Scarfo was suspended and turned in his teller drawer key. (Tr. 56, 604).

Much analysis, and trial testimony, was devoted to Scarfo's records for the period July 19, 1976, when he returned from vacation, signed for his cash and resumed duties as vault teller, up to September 7, 1976. (Tr. 644). His cash drawer figures, according to what Scarfo had recorded on his teller balance sheets, were considerably higher than bank policy allowed, particularly from August 13, 1976 to September 7, 1976. (G.A. 59A; Tr. 240). His recorded amount of large bills (\$100's and \$50's) in his cash drawer also rose markedly over necessary levels after August 17, 1976. (G.A. 65A-67A). Attention was focused on the \$8,000 withdrawal of large bills from the vault after the close of business in mid-afternoon on Friday, September 3, 1976, and a similar late afternoon withdrawal of \$9,000 in large bills on Friday, August 20, 1976. (e.g. G.A. 67A-72A). Tape analysis for each business day (late Friday through the next Tuesday, September 7, 1976 and Monday, August 23, 1976, respectively) failed to show transactions accounting for the decline in the recorded amount of large bills in the cash drawer at the end of each of the two business days. (e.g. G.A. 111A-

112A, 117A-120A). Two differing vault teller sheets for August 31, 1976 were found. One showed a count of vault cash of \$105,400 and no additional entries. (Government Exhibit 4-C). One showed transactions recorded, (Government Exhibit 4-B) which correlated with his teller balance sheets, as to vault cash amounts of \$131,100 and \$125,500 at the close of business on August 31, 1976 and September 1, 1976, respectively. (G.A. 113A-114A, 130A-132A). Scarfo's teller transfer slips for September 3 and 7, 1976 were compared to the teller transfer slips appended to the teller balance sheets for the other tellers working in each day and were found to correspond in amount. (Government Exhibits 2, 3C, 6A-6F, 7A-7F).

The other tellers testified at trial that they had seen no one near Scarfo's teller station on September 3 and 7, 1976 when Scarfo was away from his station, until McKnight and Spear did their count, that they did use teller transfer slips for all transactions with Scarfo, except for small requests for coin, that they had experienced no thefts themselves, and had not taken any money from Scarfo. (Tr. 392, 399-400, 408-410, 469-470, 479-481, 493-497, 505-508). All clerical persons who had access to the teller platform also testified they either saw no one near Scarfo's station (Tr. 130, 486), or were not near the platform. (Tr. 464-465, 604).

Scarfo's car was inspected by Cowing, and no money was found. (Tr. 104). On September 13, 1976 Special Agent Matthew Stankiewicz of the Federal Bureau of Investigation interviewed Scarfo and conducted a consent search of his car. (Government Exhibits 19 and 19-A). Scarfo stated he took home \$90 a week in salary, made \$.25 to \$.50 bets on cards, and bet occasionally at Off Track Betting (OTB) and at horse and dog races, pooling his race bets with a Mr. Whipp. (Tr. 521-522). The search of Scarfo's car revealed various OTB worksheets, both blank and filled in; a \$2.00 dog track ticket from May 3, 1976; a \$12.00 OTB ticket from May 5, 1976;

\$48.00 in OTB tickets from June 2, 1976; 34 OTB tickets from August 19, 1976 totalling \$518.00; 21 OTB tickets from August 30, 1976 totalling \$189.00; and 23 \$10.00 Quinella tickets and 7 \$126.00 key entry wheel tickets from the Plainfield dogtrack dated September 2, 1976 and totalling \$1,112.00; and five slips with baseball teams and numbers. (Government Exhibit 15) (G.A. 139A-142A). When questioned about the five slips with teams, orders and amounts, Scarfo admitted to Stankiewicz that he made bets with a bookie, Albert Buonanni, the brother of Louis Buonanni who had visited him at the bank on September 7, 1976. (G.A. 142A; Tr. 517). Scarfo also told Stankiewicz that any teller probably could obtain the combination or keys to his teller station, and possibly one of the tellers could have taken the money. (Tr. 519).

On September 17, 1976 Stankiewicz interviewed Albert and Louis Buonanni. Both brothers at trial under a promise that their testimony would not be used against them. (Tr. 529, 533, 560). Albert Buonanni testified that he had known Scarfo about one and one-half years, knew him to bet with another bookie named Harry, and booked Scarfo's bets between January and May, 1976. (Tr. 535-536). From January to March, 1976, Scarfo lost about \$1,500.00, then began betting more and won \$2,000.00 in May, 1976. (Tr. 536). Credit was extended and settlement made weekly. Scarfo generally bet two or three teams fifteen to twenty times each (approximately \$75.00 to \$100.00 depending on the odds and which was the favorite). His bets were about \$200.00 to \$300.00 a day, four days a week. (Tr. 538-541). Albert Buonanni stated Scarfo would double up if he were losing, betting up to forty times. (Tr. 542). No records were kept more than a day. (Tr. 550).

Louis Buonanni testified he met Scarfo a year before. (Tr. 561). Scarfo began betting with Louis Buonanni, who alternated with his brother, around mid-July, 1976. (Tr. 563). Scarfo began betting teams twenty times (ap-

proximately \$100.00) and if he lost, would bet each of three, four or five teams thirty or forty times, and on occasion bet one team sixty times. (Tr. 565-566). Louis Buonanni testified that Scarfo was betting every day, and that there were a couple of days in August when Scarfo bet \$1,800.00 per day and Buonanni inquired if Scarfo knew what he was doing. (Tr. 566). Louis Buonanni further testified Scarfo won \$400.00 and \$500.00 two weeks in July, 1976 and \$900.00 the week after his accident. In August, 1976 Scarfo lost \$2,200.00 in each of two weeks, \$1,700.00 another week and \$25.00 another week. (Tr. 567-572). Scarfo paid his debts in \$100's and \$50's and lost all through August, 1976, when he was betting heavily. (Tr. 575, 587, 590). Saturday and Sunday were Scarfo's heaviest betting days. (Tr. 581, 596). Louis Buonanni also testified he recognized bets on the gambling slips from Government Exhibit 15 as having been made by Scarfo with him.

Scarfo testified at trial, *inter alia*, about his gambling. Scarfo began betting with bookies in 1974. (Tr. 697). By May, 1976 he was betting twenty or thirty times on more than one team. (Tr. 700). He stated he did double up, bet what he had in cash, had a bank account from June to October, 1976 with a balance of about \$20.00, but kept up to \$3,000.00 cash at home. (Tr. 854-855).

Scarfo testified that he won \$1,700.00 the last week in July, 1976 (paid to him in early August), won \$2,400.00 the first week of August, 1976, lost \$2,200.00 the second week of August, lost \$25.00 the third week and won \$925.00 the last week in August. He testified he went to the dog track twice a week, and did not lose, and hit OTB for \$2,600.00 over three days. (Tr. 702-707). He testified that some of the dog track tickets could have been losing tickets discarded by others in his car or

picked up by him from the floor of the track to offset possible winnings for tax purposes. (Tr. 713-714, 777). Scarfo testified he bet \$800.00 to \$1,000.00 a day from June to September, 1976. (Tr. 794).

On cross-examination Scarfo admitted that he told the Grand Jury in Hartford and the Grand Jury in New Haven that he paid his losses to bookies with his OTB winnings. (Tr. 797, 800). He admitted telling the Hartford Grand Jury that he lost \$1,700.00 or \$1,800.00 one week in August and \$2,200.00 over another two weeks shortly before the accident, and that aside from a \$1,700.00 win and a \$900.00 win there were no other big wins or losses. (Tr. 799-800). Scarfo acknowledged not having told the Grand Jury about his \$2,400.00 win in August and testified that the \$1,700.00 or \$1,800.00 loss was rather in June, not August. (Tr. 800, 814-815). Scarfo admitted lying to the Grand Jury in Hartford, being confronted with his lies and warned of perjury, and continuing to lie until he could find out what the Buonannis had said. (Tr. 850).

ARGUMENT

I.

The Trial Court Did Not Err In Admitting Government Exhibits 4-B and 4-C.

Government exhibit 4, the Home Bank and Trust Main Office teller vault cash sheets from July 19, 1976, to September 23, 1976, inclusive, was initially received in evidence as a full exhibit. (G.A.1A-5A). Upon the making by the Government of a specific offer of the sheet for September 3rd, as Government exhibit 4-A and two differing vault cash sheets for August 31, 1976 as Government exhibits 4-B and 4-C (G.A. 165A, 166A), de-

fendant objected to the introduction of Government exhibits 4-B and 4-C on the ground of authenticity. The court accordingly had Government exhibits 4-B and 4-C marked for identification at defendant's request until authenticated by testimony identifying them as Scarfo's sheets. (G.A. 6A).

John Stewart, Assistant Vice President and Assistant Manager of the main office of the Home Bank and Trust Company, the office in which Scarfo was employed during 1976, was called to testify. (Tr. 277-278). Stewart was shown Government exhibits 4-B and 4-C (G.A. 165A and 166A). He testified that he recognized them to be teller vault sheets from the Home Bank and Trust, recognized the names of tellers on the sheets as being tellers who were at the Bank in August 1976, noted an entry for "myself" and recognized the handwriting therein as being Scarfo's. (G.A. 84A-85A). Stewart further testified that the exhibits were kept in the normal course of business by the Home Bank and Trust, that it was the normal course of business for the bank to keep such sheets, and that the original sheets were kept under his custody and control. (G.A. 85A). See F.R. Evid. 803(6).

Defendant then objected on the ground of relevance (G.A. 85A). Upon inquiry by the court as to the relevance of the exhibits, and a proffer by the Government that partial preparation of one sheet would support an inference of an attempt to conceal a transaction, both exhibits were admitted into evidence. (G.A. 86A-87A).

Defendant alleges two grounds for appeal, that the inference any money was missing from Scarfo's vault on August 31, 1976 is inconsistent with the evidence that on September 7, 1976 the \$15,000.45 shortage was in the cash drawer at the teller's station, and that the relevance of the evidence was outweighed by its pre-

judicial effect. Defendant's reliance on *Rodgers v. United States*, 402 F.2d 830 (9th Cir. 1968) is misplaced. *Rodgers* held that the Government could not prove that the defendant had good title to a motor vehicle and then seek to prosecute the same defendant for interstate transportation of the same motor vehicle. The Government's proof in such a situation is irreconcilably inconsistent. Here, the Government introduced evidence of two irreconcilable records for the same day. This was entirely consistent with the Government's evidence that Scarfo's large bill withdrawals, as reflected on his vault teller's cash sheet, and the large bill totals on his teller balance sheets, particularly for the periods August 20 to August 23 and September 3 to September 7, could not be reconciled with the transactions on Scarfo's teller transaction tapes for the same periods. From the time Scarfo returned from vacation on July 19, 1976 until his accident on September 7, the only audit performed was on his vault cash on September 3, which was found to agree with his records. (Tr. 266-267, Tr. 283). For the entire period therefore, the bank accepted Scarfo's teller's balance sheets as a daily record of how much cash he had in his cash drawer at his teller's station (G.A. 62A, Tr. 342). The clear inference from all the testimony about the level of total cash and large bills Scarfo recorded on his teller balance sheets, (e.g. G.A. 59A-61A, 65A-72A) particularly from August 17, 1976 to September 7, 1976 was that he did not in fact have the cash he said he had. Rather, he was using the large figures on the teller balance sheet to cover up the money he was taking and still maintain an adequate working supply of cash to perform his duties.

It was entirely consistent with the theory of the prosecution for the Government to show Scarfo using two irreconcilable records for his cash figures on the same day. Defendant asserts that this was the only evidence showing an irregularity in his recordkeeping.

(Appellant's Brief, P. 15). Defendant omits mention of the analysis of Scarfo's records for the period August 20-23 and September 3-7 which led to the conclusion that \$3,900 and approximately \$5,000 in large bills, respectively, were unaccounted for. (G.A. 110A-112A, 123A-124A, 125A-127A).

The two documents in question speak for themselves as to their relevance. Government exhibit 4-C (G.A. 166A) is a vault sheet for August 31 showing no transactions, a final count of \$105,400 in currency (bills) and \$5,710 in coin. The notation "O.K." indicates an actual count, balancing to that figure. (G.A. 105A). It does not correlate with any of his other records for the period August 30 to September 1. Government exhibit 4-B (G.A. 165A) does correlate precisely with his other records for the same period. It shows an opening currency balance of \$130,100 and a closing currency balance of \$145,400 on August 31, with a coin balance of \$17,110. The closing figures agree with the vault cash figures entered on Government exhibit 3, Scarfo's teller balance sheet for August 31, 1976. (G.A. 169A). The opening figures reflect a precise continuation of Government exhibit 4, his vault sheet for August 30 (G.A. 168), which shows a \$1,000 foreign currency withdrawal and a \$2,000 coin deposit after he balanced out at \$131,100 in vault currency and \$15,110 in vault coin, as per Government exhibit 3, his teller balance sheet for August 30, 1976. (G.A. 167, 87A-88A). The closest Scarfo got to the currency count on Government exhibit 4-C was in fact during September 1, after the Wells Fargo shipment and transactions totalling \$10,000 in withdrawals, when his currency level dropped to \$108,400. (G.A. 89A). At that point Government exhibit 4-C shows variations of \$3,000 less in \$100 bills, \$1,000 less in \$50 bills, and \$1,000 more in 10 bills. (G.A. 101-A). Scarfo testified that Government exhibit 4-C was a work sheet for the Wells Fargo shipment, yet the dis-

crepancies involved three denominations of bills he did not include in the Wells Fargo shipment which was shown on Government exhibit 4-B. (G.A. 158A-160A).

Defendant states that no Government witness had any explanation for the partially filled in sheet, Government exhibit 4-C, yet Stewart has stated that there was no reason commensurate with the normal course of business for the existence of the two different vault cash sheets, and Douglas, a Vice President and Branch Manager, stated that there should not be a second sheet for the same day. (G.A. 131-A).

The trial court has considerable latitude in balancing relevance and the danger of confusing or prejudicing the jury. *Hamling v. United States*, 418 U.S. 87, 127 (1974). It is an area in which the trial judge has wide discretion, *United States v. Ravich*, 421 F.2d 1196, 1205 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970). The balancing of probative value is normally left within the "wide, and wise, discretion of the trial court", and even a showing of slight probative effect is insufficient to warrant exclusion, as the prejudice must "substantially outweigh" that value. *United States v. Robinson*, 544 F.2d 611, 616-618 (2d Cir. 1976). The trial court's exercise of discretion should not be disturbed in the absence of a clear showing of abuse. *Control Data Corp. v. International Business Machines Corp.*, 421 F.2d 323 (8th Cir. 1973). The fact that Scarfo executed two different vault cash sheets for the same day is damaging to the defendant, but is not unfairly prejudicial within the meaning of Rule 403 of the Federal Rules of Evidence. Cf. *Robinson*, *supra*, at 618. The defendant's argument is really directed at the probative value of the two differing sheets. The trial court balanced the probative value of the exhibits against the possible prejudice to the defendant, and found the exhibits admissible. The trial court did not abuse its discretion in so doing.

II.

The Trial Court Did Not Err In Admitting Testimony By Louis Buonanni Concerning Certain Gambling Slips Recovered From The Automobile Of Appellant Neil A. Scarfo And Previously Admitted Into Evidence As Part Of Government Exhibit 15.

Louis Buonanni, a self-confessed bookmaker, testified for the Government that he took bets from Scarfo from mid-July, 1976 through early September, 1976 (Tr. 563, 567, 571). He testified in detail as to the volume of Scarfo's bets, the kind of bets and the amount of Scarfo's weekly winnings and losses. (Tr. 561-575). He further testified as to the mathematics of betting odds and how each bet (the number of "times") was calculated on a multiple of amounts required to win \$5. (Tr. 563-565, 574).

Louis Buonanni was then shown 5 slips of paper, with writing on each side, from Government exhibit 15. (G.A. 172-176). These slips had previously been admitted into evidence as a product of a search of Scarfo's car on September 13, 1976, by Special Agent Stankiewicz. (Tr. 33-34, 522-523). Stankiewicz had testified that they indicated orders and amounts and baseball teams, but that he could not decipher them. (G.A. 141A).

Buonanni was then shown the 5 slips from Government exhibit 15. (G.A. 172A-176A). He was asked if he recognized what they were and responded they were baseball slips a "he" was betting, but did not recognize the handwriting. (G.A. 145A). The thrust of the Government's questioning was toward obtaining a technical explanation as to what the slips were or appeared to be, as to volume of bets represented. (G.A. 145A, 148A). Buonanni conceded he could not tell what day or month the bets on the slips were made. (G.A. 146A). Defendant

objected on grounds of remoteness. The court overruled the objection, stating that the testimony as to the source of the slips (Scarfo's car) was sufficient to establish relevance. (G.A. 147A). Buonanni continued to decipher some of the notations as to volume of bets (G.A. 147A-150A). It was primarily in response to cross-examination that he insisted he recognized most of the bets as the type made with him by Scarfo. (G.A. 150A-155A).

Defendant now alleges error, arguing that the lack of a time frame for the slips diminished their probative value to the point where the danger of the jury connecting them with testimony of August betting losses was so great as to constitute unfair prejudice. He asserts that the relevance was so far outweighed by the prejudicial effect that the trial court abused its discretion under Rule 403 of the Federal Rules of Evidence.

The exhibit speaks for itself. In almost every instance, only one baseball team is listed per bet, so as to make it impossible to consult a schedule. Odds are noted, as are the number of "times" for many of the games. The plus figures on the slips range from 190 to 1600; the loss figures range from 670 to 1760. Louis Buonanni's testimony, however, did not focus on the amount of winnings or losses, so much as on the volume of bets. Most of the bets indicate 20, 30 and 40 times per bet, a higher level than Scarfo generally bet with Albert Buonanni from January to May, 1976 (Tr. 540-541), and a level Louis Buonanni testified Scarfo did bet with him from July to September, 1976. (Tr. 565-566). Further, the bets relate to baseball teams, which play in the spring and summer. Scarfo subsequently acknowledged that the slips represented bets he probably made with Albert or Louis Buonanni, but could not say when. (G.A. 156A-157A).

Scarfo testified he bet \$800 to \$1,000 a day from June, 1976 to September, 1976 (Tr. 794). Whether the five gambling slips (Government exhibit 15) were asso-

ciated with August, when Louis Buonanni said Scarfo lost, or an earlier month in the summer of 1976, is not significant. The slips, and Louis Buonanni's testimony pertinent thereto, were offered to establish the volume of bets, not winnings or losses. The gambling slips are fixed sufficiently in time because of when they were found, September 13, and because of the dated betting tickets found with them in Scarfo's car. Since the dated betting tickets covered a period of from May to September, 1976, the jury could infer that the undated tickets represented wagers made during this period as well.

Defendant acknowledges the general rule that the possession of large sums of money is relevant (to motive) in crimes involving financial gain. (Appellant's Brief, P. 17). *United States v. Ravich, supra*, at 1204; *Dimmick v. United States*, 135 F. 257 (9th Cir. 1905). Motive is in issue in this case and is essential to the consideration of overcoming the possibility of a mere financial discrepancy. I Wigmore, *Evidence* § 119 (3rd ed. 1940). Balancing the probative value of the evidence against its possible prejudicial effect, see *United States v. Robinson, supra*, at 615-619, the trial court did not abuse its discretion. In balancing probative value with the possibility of unfair prejudice, II Wigmore, *Evidence, supra* at § 392 states:

. . . in cases of merely speculative crime (such as larceny or embezzlement) . . . the fact that he was in need of it (money) at the time is decidedly relevant to show a probable desire to obtain it and therefore a probable borrowing or purloining; and there is here not the same objection from the standpoint of possible Unfair Prejudice. (parentheses added)

The trial court admitted explanatory testimony, admissible under Rules 701 and 702, Federal Rules of Evidence. There had already been prior testimony about

the defendant's gambling. In ruling previously on defendant's motion to exclude the testimony of the Buonannis as prejudicial, (G.A. 75A-82A), the trial court pointed out that it would admit the evidence if for no other reason than because the defendant, at the very beginning of the trial, requested the trial court to voir dire the jury on gambling. The court, acting at the defendant's request, did so, thereby injecting the issue into the case.

Therefore, the trial court properly admitted the Buonanni testimony.

III.

The Government Presented Ample Evidence From Which A Reasonable Mind Might Fairly Conclude Guilt Beyond A Reasonable Doubt.

In the present case, as in any criminal case, constitutional due process required the Government to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. *In re Winship*, 397 U.S. 358, 364 (1970). The defendant here contends that the Government's proof was insufficient to sustain the defendant's conviction.

When a defendant appeals a conviction, all the evidence must be viewed in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Marrapese*, 486 F.2d 918, 921 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974).

Where a defendant has moved for a judgment of acquittal, (G.A. 177A-182A), the trial court must determine whether, upon the evidence, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. *United States v. Taylor*, 464 F.2d 240, 243 (2d Cir. 1972);

United States v. Figueroa-Paz, 468 F.2d 1055, 1058 (9th Cir. 1972). Even where the Government's case is entirely circumstantial, the evidence does not have to be such as to exclude every reasonable hypothesis other than that of guilt, and the evidence must be viewed in light of the totality of the Government's case since one fact may gain color from others. *United States v. Tramunti*, 500 F.2d 1334, 1338 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974); *United States v. Hawley*, 554 F.2d 50 (2d Cir. 1977). Circumstantial evidence is of no less value than testimonial evidence, the question being whether the jury can rationally and logically infer the ultimate fact to be proved from the basic facts. *United States v. Bowles*, 428 F.2d 592, 597 (2d Cir.), *cert. denied*, 400 U.S. 928 (1970).

In the present case, the Government presented ample evidence from which a reasonable mind might fairly conclude guilt beyond a reasonable doubt. The defendant had the opportunity to take the money wrongfully; the money was under his control; the opportunity for another teller or a non-employee to take the money was remote; the defendant's records on total cash and the level of large bills in his cash drawer were not substantiated by the transactions on his teller tapes; the defendant had the motive to steal; and the defendant lied about facts relative to motive. The jury was able to weigh ample testimony from which they could infer an intent to defraud the bank.

There was ample testimony to establish a shortage of \$15,000.45 in Scarfo's cash drawers at his teller's station on September 7, 1976. His cash in the inner vault agreed with his own records on the vault cash sheet (G.A. 37A). The cash was counted by each of two bank Vice-Presidents, the President, (bill by bill and coin by coin) the Senior Vice-President, and on September 8, 1976, by the auditor, who confirmed the shortage after an audit of the entire bank. (G.A. 14A, 36A-39A, 62A-63A). The computations used by the first two Vice-Presidents, and recorded by

them on Scarfo's teller balance sheet for September 7th, (Government exhibit 2) (G.A. 171A), were testified to in detail. (G.A. 49A-57A). The area was searched and considerable time was devoted to checking his transactions with other tellers and checking his own teller tape against actual items sent to the proof department in an effort to locate a mis-entry or an omitted entry. None was found. (G.A. 15A, 38A). Scarfo affirmed the improbability of an error of that magnitude, as permission is required to cash a large item. (G.A. 161A-162A).

The possibility of theft was amply explored at trial. If a theft occurred, it had to be after he balanced out by his own count (Government exhibit 3-C) at mid-afternoon on Friday, September 3rd, and before noon on Tuesday, September 7th, when he did not return from lunch, and the procedures were commenced to open his cash drawer to balance him out. (G.A. 11A; Tr. 50-51, 132, 149). All the other tellers testified they had experienced no thefts themselves, and on September 3rd and 7th, had seen no one near Scarfo's teller station, other than Scarfo and the officers performing the count. (e.g. Tr. 470). Scarfo testified the only time he might have been away from his station was going back and forth from his own closed station to the drive-in-teller window when he relieved during that teller's dinner hour on Friday evening, and when he helped carry coins from the vault on the morning of September 7th, when he might have left his cash drawer unlocked. (Tr. 655-657). Scarfo acknowledged that he had to deactivate an alarm in the main vault in order to get his cash drawer and take it to his station. (Tr. 657).

The security measures were testified to in detail and involved an alarm and timer on the main vault; combinations on the inner vault compartments wherein the teller cash drawers are kept at night and on weekends; specially designed counters on the teller stations to prevent customers reaching into the working cash in the top drawer,

let alone the reserve cash in the lower drawer; combination locks on the coin compartments; high partitions between teller stations to prevent one teller from reaching over into another station, and a specially designed safe deposit box wherein a duplicate key to each teller station was kept together with the combination to each cash locker in the vault. The only keys to the safe deposit box were kept by two different officers, a duplicate to one kept by the supervisory teller, and none by the vault attendant. (G.A. 20A-31A). The expressed purpose of the teller station design was to place each teller exclusively in control of his or her teller station and solely responsible for the cash therein. (G.A. 22A-23A, 27A). The only other person who knew the combination to Scarfo's inner cash vault was the supervisory teller and former vault teller, Bernadette Knight, who was on vacation. (G.A. 114A). Scarfo retained his own teller station when he became vault teller. (Tr. 416). Although a letter to the manufacturer is usually required to obtain a duplicate key to the type of lock on a teller station drawer, it was considered as a possibility that a former teller or a teller transferred to another branch, who occupied the station before Scarfo, might have had a duplicate key made. (Tr. 113-115). Even if such a former teller had a duplicate key, any unauthorized person's presence near another teller's station would have been suspicious (Tr. 115), and the theft would have to have been timed to coincide with Scarfo's lunch hour on the very day of his accident.

Considerable testimony was presented on Scarfo's records. The apparent discrepancy between his two differing vault cash sheets, Government exhibits 4-B and 4-C, (G.A. 165A, 166A), has been analyzed in detail in the first argument, *supra*. Attention was focused on the rising level of his recorded drawer cash kept at his teller station and his withdrawals of large bills from his vault after he balanced out at the close of the business day for Friday, August 20, and Friday, September 3. Transactions occurring after the close of the business day at mid-

afternoon on a Friday, but before the bank itself closes to the public about 7 P.M., are recorded on the transaction tape for the following business day, herein Monday, August 23 and Tuesday, September 7, the bank having been closed on Labor Day, September 6 (Tr. 50-51).

In between audits, the bank accepts the teller's word, as per his daily teller balance sheet, that he in fact has the cash he says he has. (G.A. 61A-62A). Permissible limits are \$10,000 Monday through Wednesday and \$15,000 Thursday and Friday. According to the auditor Azzola, Scarfo was \$13,000 to \$24,000 over the limit from August 13 to September 7. (G.A. 59A, 61A). A similar opinion was given by Stewart and Knight (G.A. 109A, Tr.342). Scarfo's level of large bills he recorded as having in his drawer also rose markedly in excess of a teller's needs after August 17, 1976, Azzola testifying that \$2,000 to \$3,000 was enough. (G.A. 66A-67A). Stewart, Knight and Douglas reached a similar conclusion. (G.A. 109A, 128A, Tr. 343-344.).

Scarfo's records showed large bill withdrawals from his vault on only four days between July and September 7, 1976, \$3,000 on July 21st, \$9,000 on August 20, \$1,000 on August 23 and \$8,000 on September 3. (Government exhibit 5). Testimony was given that the bank usually did not have to order large bills, but rather sold the excess it took in through customer deposits. (e.g. G.A. 138A). Further, Douglas and Knight testified their customers did not want to accept large bills, particularly on Fridays, when payroll checks are cashed. (G.A. 123A, 137A, Tr. 450).

Scarfo's withdrawal of \$8,000 in large bills from the vault after he balanced out in mid-afternoon Friday, September 3, was analyzed. He balanced out for September 3 with \$14,150 in large bills. He withdrew another \$8,000, giving him \$22,150. His only transac-

tion in large bills with another teller, \$2,000 sold to Cassano, occurred before he balanced out for September 3 at \$14,150. (Tr. 493). He had two transactions involving possible change in large bills for \$600 and \$800. His tape showed no other transactions in which large bills would normally be given to a customer. His closing count on Tuesday was \$14,600 in large bills. Assuming no deposits of large bills during the period covered by the tape from mid afternoon on September 3 up to the time of his accident on September 7, this left an unaccounted for balance of over \$6,000 in large bills. (G.A. 118A-124A, 134A-138A). The withdrawal of \$8,000 in large bills on September 3 was not based on any "legitimate reason", according to Azzola. (G.A. 114A-115A).

When questioned on September 8, Scarfo attributed the drop in large bills to transactions with other tellers, executed without transfer slips, in which they bought small bills from him with large bills. This would have increased his supply and was contradicted by all the tellers' testimony and their transfer slips for September 3 and 7 which corresponded to Scarfo's slips for the same dates. (Government exhibits 6A-F, 7A-F, 2, 3C, e.g. Tr. 508).

Regarding the fear of a shortage in 10's and 20's on the afternoon of September 3, Azzola testified that Scarfo's supply of \$17,000 in 20's was sufficient to handle any shortage. (G.A. 74A). Barbara Simmons also testified she received a shipment of \$12,000 that afternoon, sold small bills to the other tellers, and during a shortage would have "pushed" smaller bills, not large ones. (Tr. 503-4).

On Friday, August 20, Scarfo balanced out with \$3,000 in large bills. He then withdrew \$9,000 in large bills from the vault, withdrew another \$1,000 in large

bills on Monday, August 23, received \$6,000 in large bills from another teller and sold \$6,500 to the vault, ending up with \$8,600 in large bills when he balanced out on August 23. The teller's tape was analyzed and showed no transactions in large bills. Assuming no deposits in large bills, although Monday was termed by Knight an "in" or deposit day, there is an unaccounted for drop from \$12,500 he should have had to \$8,600, or a \$3,900 shortage in large bills. (G.A. 125A-127A, Tr. 420-422). Azzola and Douglas agreed there was no reason for the \$9,000 withdrawal from the vault on Friday afternoon, August 20. (G.A. 67A-68A, 128A-129A).

Scarfo's explanation was that his customers didn't mind large bills and he checked off on the two tapes for August 23 and September 7, (Government exhibits 9 and 17A), the transactions in which he could have given change in large bills for each period August 20 to 23 and September 3 to 7. (Government exhibits 20 and 20A; charts of the checked off transactions appear in the Appendix to Defendant's Brief). Scarfo's calculation was based on his giving only 50's and 100's in change whenever possible. His total of \$6800 in such amounts for the August 23 tape and \$15,000 in such amounts for the September 7 tape would have required him to give customers approximately 60% and 40% of their change in 50's and 100's on the respective dates. (Tr. 829-830). Knight testified she had the same customers as Scarfo and, as stated above, large bills were not wanted. (Tr. 450).

In addition to the deficiencies in Scarfo's records, ample evidence was presented on his motive to steal, or convert to his own use, funds under his control in the bank. His gambling losses in August, 1976 were substantial according to his bookie and his own dog track tickets, even

without considering the five gambling slips. (Government Exhibit 15). Scarfo bet \$800 to \$1,000 a day, by his own admission, from June to September, 1976 (Tr. 794) and even up to \$1,800 a day on a take-home salary of \$90 a week. Apart from his salary, he had no other source of income, except for \$43 quarterly as an auditor for a club. (Tr. 695).

In *United States v. Currier*, 454 F.2d 835 (1st Cir. 1972), the defendant, a bank teller, was convicted of embezzlement of funds. Her defense was that she did not have *sole access or exclusive control* of the deposits in question and that therefore *someone else could have* embezzled the funds. The Government's case was largely circumstantial and was based on an analysis of the manner in which defendant handled deposits for which she had primary responsibility, an erasure on her records, and handwriting strongly resembling that of defendant. In rejecting her claim of a "hypothetical embezzler" who could have withheld deposits, the Court held that circumstantial evidence need not exclude every reasonable hypothesis of innocence. *United States v. Currier*, *supra* at 838, citing, *inter alia*, *Holland v. United States*, 348 U.S. 121 (1954); *United States v. Glasser*, 443 F.2d 994 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971). Mrs. Currier's claim of another teller possibly withholding deposits without her knowledge is less remote than Scarfo's claim another teller or former teller could have gained access to his cash drawer on September 3 or 7, 1976.

The jury was able to infer that the loss of \$15,000.45 was attributable to Scarfo and was able to assess the credibility of the witnesses. On the basis of the evidence, the jury could reasonably reach a verdict of guilty and the trial court did not err in denying defendant's motion for a judgment of acquittal.

CONCLUSION

For all of the foregoing reasons, the Government respectfully urges that the defendant's conviction should be affirmed.

Respectfully submitted,

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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

No. 77-1204

U S A, APPELLEE

vs.

NEIL A. SCARFO, APPELLANT

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Avenue, Brooklyn, New York

That on the 27th day of July, 1977, deponent served the within Brief and Appendix upon Brian J. Farrell, Esq., 34 Academy Street, Wallingford, Connecticut 06492

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sensale

Sworn to before me,

This 27th day of July, 1977

Shirley M. Allen

SHIRLEY M. ALLEN
Notary Public, State of New York
No. 24-01484-02705
Commission Expires March 30, 1979

